IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.456 OF 2004

Shri Anthonio F.D.P.S.D'Souza,
aged about 43 yrs,
presently residing at Room No.2,
Ankita Chawl, Marve Road,
Bazar Road, Malwani,
Malad (West),
Mumbai 400095. .. Petitioner.

Vs

The State of Maharashtra,
At the instance of Senior
Inspector of Police,
Bandra Police Station,
Bandra (w),
Mumbai-400 050 .. Respondent

Mr H.S.Anand, Advocate for the petitioner.(Absent)
Mr D.S.Mhaispurkar, APP for the respondent.

CORAM : Smt.Ranjana Desai &
D.B.Bhosale, JJ.

DATE : 13th June, 2005.

JUDGMENT : (Per D.B.Bhosale, J.)

1. The present writ petition filed under Article 226 of the Constitution of India, seeks an appropriate order and direction in the nature of Habeas Corpus calling upon the respondent- Senior Inspector of Police, Bandra Police Station, to produce petitioner's wife Mrs Maria Rosy D'Souza, releasing her from illegal detention by Mrs Agnus Francis, Mr Valerian D'SA, Alex Francis and Felex Francis. The petitioner has also prayed for an order

and direction in the nature of a writ of Mandamus directing the respondent -Senior Inspector of Police, Bandra Police Station, to investigate a complaint of the petitioner, pursuant to the directions issued by the learned Metropolitan Magistrate in Criminal Complaint bearing No. 806/N/2003 filed against the aforementioned four accused, by arresting them in connection with the said complaint.

2. This petition was placed before us on three earlier occasions and on all the occasions none appeared for the petitioner and hence we were constrained to proceed to dispose of this writ petition in the absence of the petitioner and his advocate. We heard the learned Addl.Public Prosecutor, perused the writ petition as also the reply affidavits filed by the respondent-State.

3. Briefly stated, the petitioner's wife, who was suffering from brain tumour and who had undergone major operation successfully, was taking follow up treatment. At the relevant time, the petitioner was working at Baharain as a driver and, therefore, he was depending on Mrs Agnus Francis,his sister-in-law, for follow up treatment of his wife. He claims that he had paid an amount of Rs.95,000/- to his

sister-in-law and had also given the fixed deposit certificates of the Bank and jewellery worth Rs.65,000 to Rs.70,000/- for incurring the expenses for the treatment of his wife. According to the petitioner, initially, Agnus Francis and other accused against whom the criminal complaint has been filed were looking after his wife properly. However, since January, 2003 the petitioner found that Mrs Agnus Francis and Mr Valerian D'SA were not responding to his telephone calls and they started avoiding him. On 11.2.2003, he received S.M.S. message at Baharain sent by Felex Francis informing him that his wife was missing. He was informed that when his wife was returning home in the Auto with Agnus Francis it was stopped few yards before their residence at Chappel Road, Bandra by Mrs Agnus Francis for purchasing something in the market. Agnus went for marketing leaving the wife of the petitioner all alone in the Auto, and when she returned she found that the petitioner's wife was not there in the Auto nor did she reach home and since then she has been missing. The petitioner, after getting leave, came to India. According to him, Agnus Francis and others have kidnapped and illegally detained his wife and has also expressed apprehension that his wife might have been killed by them.

According to the petitioner, after he returned from Baharain, he found the conduct of Agnus Francis and others suspicious inasmuch as they did not bother to lodge a missing complaint at all or make any efforts to trace his wife. He has alleged that his wife must have been killed for the sake of money and the articles which were left by him with Agnus Francis for incurring the expenses of the follow up treatment of his wife. The petitioner, accordingly, gave the complaint to the senior Inspector of Police, Bandra Police Station on 26.3.2003 and also approached other police authorities in Mumbai. Since his all efforts failed to trace his wife, he filed the complaint before the learned Metropolitan Magistrate, 12th Court, Bandra, Mumbai, against all the four accused for the offence under sections 365 read with 34 of IPC seeking direction under section 156(3) of Cr.P.C. The learned Magistrate issued the directions as prayed for vide his order dated 9.4.2003 to the Senior Inspector of Police to investigate the complaint of the petitioner. The petitioner has alleged that despite the order passed by the learned Magistrate, Bandra Police Station has not registered an offence or carried out any investigation whatsoever. The petitioner in support of his allegation against Agnus Francis and others placed

reliance upon one additional circumstance stating that the name of Flex Francis was added in the ration card to show that he was residing with his wife and daughter, by committing forgery. He has further alleged that cash of Rs.95,000/- given by him to Agnus Francis for the treatment of his wife as also the fixed deposit certificates and the jewellery, has been misappropriated by her. Against this backdrop, the petitioner has approached this Court by way of this writ petition under Article 226 of the Constitution of India seeking direction in the nature of a writ of Habeas Corpus, as also a writ of Mandamus seeking directions to the concerned police station to carry out investigation in his complaint in pursuance of the order passed by the learned Magistrate.

4. The State has filed two reply affidavits both affirmed by Kiran Balwadkar, Police Sub Inspector attached to Bandra Police Station, Mumbai, denying all the allegations made in the writ petition filed by the petitioner.

5. We perused the writ petition and the annexures thereto, as also the affidavits and its annexures with the assistance of Mr Mhaispurkar,

learned APP. It reveals from the material produced before us that the wife of the petitioner was suffering from brain tumour and she had been operated and was taking follow up treatment. Since the petitioner was serving at Baharain it was not possible for him to stay back in Bombay for the treatment of his wife and, therefore, he was depending on Agnus Francis, his sister-in-law. It appears from the record produced before us that Agnus Francis used to take the petitioner's wife for routine check-up and for follow up treatment to the hospital. When the wife of the petitioner was found missing, Felex Francis immediately informed the petitioner. The daughter of the petitioner, who was staying with his wife at the relevant time, immediately lodged missing complaint at Bandra Police Station with the help of Agnus Francis. Kiran Balwadkar in his affidavit has specifically stated that when the missing complaint was lodged by the daughter of the petitioner, Agnus Francis was with her and her statement was also recorded by him. Even after filing of the complaint by the petitioner against Agnus Francis and three others and after the order was passed by the learned Magistrate under section 156(3) of Cr.P.C, the offence was registered against them and the investigation was carried out.

He has named seven persons whose statements were recorded by him during investigation. It further reveals from the affidavit that he also made efforts to trace the wife of the petitioner by showing her photograph on TV channel and also publishing it in the local newspapers. She was also searched at the residence of her all relatives. An attempt was also made to find out whether she has gone out of India by making inquiries at Bombay and Goa Air Ports. The statement of the daughter of the petitioner was also recorded in which she made certain allegations against the petitioner. She has stated that the complaint lodged by her father against Agnus Francis and others is false and she apprehends danger to her life from her father. In so far as adding the name of Felex Francis in the ration card is concerned, the investigating officer has categorically stated that the form for adding the name of the Felex Francis was filled in by the wife of the petitioner and, therefore, the allegation of forgery is not correct. The relevant documents are annexed to the affidavit. It further reveals that even the jewellery and other articles, which were handed over by the petitioner to Agnus Francis, were also returned by her to the petitioner on 2.4.2003. In the additional affidavit, he has further stated as to what efforts were made by

him to find the petitioner's wife. We were informed that the concerned police station has filed their report in pursuance of the order under section 156 (3) of Cr.P.C. The law is well settled that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the FIR, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. This is settled by the Apex Court in **Bhagwant Singh Vs Commissioner of Police and ors, AIR 1985 SC 1285.** Keeping that in view and considering the affidavits filed by the respondent, in our opinion, this is not a fit case to issue a writ in the nature of Habeas Corpus, calling upon the respondent to produce the petitioner's wife before this Court and even to issue directions to register an offence and carry out investigation in pursuance of the order under section 154 (3) of Cr.P.C, passed in the petitioner's complaint, since the police have already registered the offence and the investigation is being done by the respondent. Moreover, the present case, prima facie, appears to be a case of

missing person. The possibility of the petitioner's wife having been suffered unnatural death cannot be ruled out. It is always open for the petitioner to pursue the complaint filed by him in the Court of law. Similarly, the police can still make further efforts to find the petitioner's wife in pursuance of the missing complaint lodged by the daughter of the petitioner and for that purpose the petitioner has every right to approach the concerned police station requesting them to make further efforts to find his wife, who is either missing or might have suffered unnatural death. Keeping in view the peculiar facts and circumstances of the case, in our opinion, a writ of Habeas Corpus cannot be issued and, therefore, that prayer deserves to be rejected. In so far as the prayer seeking an appropriate order in the nature of Mandamus is concerned, we are satisfied that the police have made all possible efforts and taken steps in connection with the complaint lodged by the petitioner in pursuance of the order passed by the learned Magistrate under section 156 (3) of the Cr.P.C. It is still open for the petitioner to approach the concerned learned Magistrate and pursue his complaint and take the same to its logical end. It is needless to record that the petitioner will have a right of being heard before the learned

Magistrate passes an order in the report of the police submitted under section 173 of Cr.P.C, in the petitioner's complaint filed before the learned Metropolitan Magistrate, 12th Court, Bandra. In the result, this writ petition fails and is dismissed as such. Rule stands discharged.

6. We make it clear that we have not expressed any final opinion on the merits of the case and the learned Magistrate dealing with it shall examine it independently. Nothing said by us in this judgment on the merits of the case be treated as our final expression on merits.

(D.B.Bhosale, J.) **(Smt Ranjana Desai, J.)**

jb-crwp456-04

HIGH COURT
CRIMINAL APPELLATE SIDE

CRIMINAL WRIT PETITION NO.456 OF 2004

Date of Judgment:

13th June, 2005.

For approval and signature

THE HON'BLE SMT.JUSTICE RANJANA DESAI.

THE HON'BLE MR.JUSTICE D.B.BHOSALE.

1. Whether Reporters of Local Papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the Judgment?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any Order made thereunder?

5. Whether it is to be circulated to the Civil Judges?

6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Aurangabad or Goa offices?